IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23965-9-III**
	)	**(consolidated with**
Respondent,	)	**No. 24699-0-III)**
	)	
v.	)	
	)	**Division Three**
JOSEPH EARL SINGLETON,	)	
	)	
Appellant.	)	
	)	
In the Matter of the Personal Restraint Petition of:	)	
	)	
JOSEPH E. SINGLETON,	)	**UNPUBLISHED OPINION**
	)	
Petitioner.	)	
	)	

SCHULTHEIS, A.C.J. — In sentencing Joseph Singleton for first degree rape and third degree assault, the trial court included out-of-state convictions for murder and purse snatching in the offender score. Mr. Singleton appeals, contending the State failed to prove and the trial court failed to find that the foreign convictions were comparable to Washington offenses. In his consolidated personal restraint petition, Mr. Singleton

contends his trial and appellate attorneys had conflicts of interests. We affirm the judgment. However, because we find that the record is insufficient to determine the comparability of the foreign convictions, we vacate the sentence and remand for further proceedings consistent with this opinion.

Facts

In January 2000, Mr. Singleton was charged by information with one count of first degree rape (RCW 9A.44.040) and one count of third degree assault (RCW 9A.36.031), based on acts committed earlier that month. The information was amended in March 2000 to add a count of first degree kidnapping (RCW 9A.40.020). A jury found Mr. Singleton guilty on all counts.

At sentencing, the trial court dismissed the kidnapping conviction due to the doctrine of merger. Based on a criminal history that included convictions for third degree burglary and murder in Alabama and purse snatching in Louisiana, the trial court used an offender score of seven for the rape conviction and an offender score of five for the assault conviction. It then imposed the top of the sentence range for both convictions, to run concurrently. The total sentence was 236 months.

Mr. Singleton's appeal of the judgment and sentence was unsuccessful and the judgment was mandated in May 2002. In his first personal restraint petition filed in the Washington Supreme Court, Mr. Singleton argued ineffective assistance of counsel and

miscalculation of the offender score. This petition was transferred to Division Three of the Court of Appeals. In the order dismissing this petition, we found that the trial court considered the Louisiana purse snatching equivalent to first degree theft in Washington, and that the Alabama burglary was essentially identical to the Washington crime of second degree burglary. Noting that Mr. Singleton did not challenge the existence of these prior convictions, we concluded that he failed to show that his offender score was less than seven. *In re Pers. Restraint of Singleton*, No. 22025-7-III, Order Dismissing Personal Restraint Petition at 4-5 (Wash. Ct. App. June 19, 2003) (Resp't's Br. App.).

In early February 2004, Mr. Singleton filed a second personal restraint petition in the Supreme Court. He argued in this petition that the Alabama murder and burglary convictions should count as one point on his offender score because they were served concurrently. A deputy prosecuting attorney sent a letter to the Supreme Court admitting that the Alabama convictions should have counted as "one point." Clerk's Papers (CP) at 38. Consequently, the petition was transferred to the superior court for resentencing.

At the hearing on the resentencing, Mr. Singleton unsuccessfully attempted to challenge another prior conviction. His counsel argued that with the State's concession that the Alabama burglary and murder convictions should be counted as one point, the offender score for the rape conviction should be four because the purse snatching should wash out. The State responded that the deputy prosecuting attorney meant to say the

Alabama convictions should count as one offense, not one point. Assigning an offender score of two to the Alabama murder conviction (as a serious violent offense), the court found that the corrected offender score for the rape conviction should be six points, and for the assault conviction should be four points. The court imposed the high end of the standard range sentence for the rape conviction—216 months—to run concurrently with the sentence for the assault.

Mr. Singleton appeals the amended judgment and sentence. While the appeal was pending, he filed a third personal restraint petition in the Supreme Court. That petition was transferred to this court and is consolidated with this appeal.

Counting Foreign Convictions in the Offender Score

The question before this court is whether the prior foreign convictions were properly included in the offender score for the first degree rape and third degree assault convictions. Mr. Singleton contends the State failed to prove and the trial court failed to find that the Alabama murder and the Louisiana purse snatching were comparable to Washington crimes. We review the sentencing court's calculation of the offender score de novo. *State v. Wilson*, 113 Wn. App. 122, 136, 52 P.3d 545 (2002).

It should first be noted that the illegality or erroneous nature of an offender score may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Generally a defendant cannot waive a challenge to a miscalculated offender

score unless the alleged error involves a stipulation to incorrect facts or a matter of trial court discretion. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Mr. Singleton did not stipulate to the facts of his prior foreign convictions. Consequently, his assertion that the offender score is incorrect is properly before this court.

At sentencing, it is the State's burden to provide reliable evidence of the defendant's criminal history. *Wilson*, 113 Wn. App. at 136. Mr. Singleton has not challenged the existence of these prior convictions. Consequently, we limit our review to the comparability of the foreign crimes to Washington offenses.

Out-of-state convictions are classified according to comparable Washington offense definitions and sentences for the purposes of a defendant's offender score. RCW 9.94A.525(3). To determine comparability we compare the elements of the foreign and the Washington crimes as of the date the foreign crime was committed. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are not substantially similar, the sentencing court may consider the indictment or information to determine whether the defendant's conduct would have violated a comparable Washington statute. *Id.* Only those facts or allegations in the record that relate directly to the elements of the charged crime may be considered. *Id.* Additionally, the sentencing court may only consider those underlying facts of the foreign conviction that were

stipulated to or were found by the trier of fact beyond a reasonable doubt. *Id.* at 258.

The foreign crimes challenged by Mr. Singleton are the 1991 purse snatching offense in Louisiana and the 1985 murder in Alabama. The State contends review of this issue is foreclosed by the law of the case doctrine because this court's disposition of Mr. Singleton's first personal restraint petition involved consideration of a challenge to the offender score. He argued in that petition that the Alabama third degree burglary and the Louisiana purse snatching were washed out. Citing the report of proceedings from a pretrial hearing on the admissibility of impeachment evidence, this court found that the trial court considered the purse snatching to be the equivalent of first degree theft in Washington. Under the statute then in effect, first degree theft—a class B felony—would not have washed out by the time of Mr. Singleton's next felony conviction in 1998. RCW 9A.56.030(1)(b); former RCW 9.94A.360(2) (1990). This court also stated, without reference to the record, that the Alabama murder was a serious violent offense.

The law of the case doctrine provides that "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). RAP 2.5(c)(2) codifies restrictions on the doctrine and emphasizes that it is discretionary: "The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served,

decide the case on the basis of the appellate court's opinion of the law at the time of the later review." *Quoted in Roberson*, 156 Wn.2d at 42. Our review of the propriety of the order dismissing Mr. Singleton's earlier petition will focus on the evidence to support the comparability of the purse snatching and murder convictions.

In determining whether a foreign conviction is comparable to a Washington offense, the sentencing court must examine reliable evidence of the elements of the foreign crime that were proved beyond a reasonable doubt. *Lavery*, 154 Wn.2d at 256. The State carries the burden of providing a certified copy of the judgment or comparable documents of record or transcripts of prior proceedings. *Wilson*, 113 Wn. App. at 136. Uncertified or unauthenticated copies of purported court records are not adequate to establish a defendant's criminal history absent a stipulation or order of the court. *Id*. at 136-37.

The record before this court simply does not show that certified or otherwise reliable documents were considered by the sentencing court when it counted the Louisiana purse snatching and the Alabama murder in Mr. Singleton's offender score. The document cited by the State for the purse snatching offense is a supplement to the State's brief in support of an exceptional sentence, which merely states that "[t]he defendant's criminal history is attached to the State's brief in support of this court imposing an exceptional sentence." CP at 70. If the sentencing court relied on certified

records to find that the purse snatching was comparable to first degree theft in Washington, the record does not show it. Nor does the record show what elements of "murder" were the basis of Mr. Singleton's Alabama conviction or the comparable crime in Washington.

Because this record is insufficient to show that the State met its burden of proof on the comparability of the foreign convictions, it is impossible to determine whether the sentencing court counted the correct offender score. The 2003 order dismissing the personal restraint petition does not indicate what documents were considered by the sentencing court. Accordingly, the conclusions reached in the 2003 order will be disregarded by this court in the interests of justice. RAP 2.5(c)(2).

This sentence is vacated and remanded for resentencing. Although on remand we usually hold the State to the existing record, it is not clear from this record whether Mr. Singleton claimed any deficiencies in the offender score before the sentencing court. Consequently, remand for an evidentiary hearing allowing the State to prove the classification of the purse snatching and murder convictions is appropriate. *Ford*, 137 Wn.2d at 485.

Conflict of Interest

In Mr. Singleton's consolidated personal restraint petition filed August 23, 2005, he raises issues of conflict of interest and ineffective assistance of counsel. These issues

are without merit. His contention that the various lawyers in the public defender's office had conflicts of interest that impacted his case is unsupported by the record. Even if the public defender's office hired the deputy prosecutor who prosecuted him, or if the various lawyers in that office conferred on his case, he does not show an actual conflict of interest that adversely affected his lawyer's performance at trial or on appeal. *See State v. Davis*, 141 Wn.2d 798, 860-61, 10 P.3d 977 (2000) (more than the mere possibility of a conflict of interest is necessary to impugn a criminal conviction). He also fails to indicate what deficiency in trial counsel's performance prejudiced the outcome of his case. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005).

For the above reasons, Mr. Singleton's personal restraint petition is dismissed. The court also denies Mr. Singleton's request for appointed counsel. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150(4).

Judgment affirmed. Sentence vacated and remanded for a comparability determination.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, A.C.J.

WE CONCUR:

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Brown, J.

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Kato, J.